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In the

Supreme Court of the United States

October Term, 1956

No. 249

BRITISH TRANSPORT COMMISSION, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA, ETC.,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Petitioners herein, Arther Goodman, et al., respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on February 13, 1956, which affirmed that part of the judgment of the United States District Court for the Eastern District of Virginia, exonerating the United States of America as owner of the U.S.N.S. *Haiti Victory* for all damages caused by collision with the S.S. *Duke of York*.

THE OPINIONS OF THE COURTS BELOW

The opinion of the District Court for the Eastern District of Virginia, Norfolk Division, is printed in the appendix

hereto and also annexed to the record of the Court below and is reported in 131 F. Supp. 712.

The opinion of the Court of Appeals for the Fourth Circuit is printed in the appendix hereto and also is reported in 230 F. 2d 139.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on February 13, 1956. Extension of time to file this petition up to and including July 12th, 1956, was granted by order of this Court dated May 11th, 1956.

This cause has been brought by petition of the United States of America for limitation of or exoneration from liability under Sec. 183b of Title 46 U. S. C. and is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

The jurisdiction of this Court to review by Writ of Certiorari the judgment complained of is conferred by 28 U. S. C. Secs 1254(1) and 2101(c).

QUESTIONS PRESENTED

I. Is there any duty on the part of the navigator to use radar when he mistakenly believes that there is adequate visibility?

II. After failing to use radar may a vessel be exonerated when she fails to stop her engines immediately on hearing a fog signal forward of her beam?

STATUTES INVOLVED

Articles 16 and 29 of the regulations for preventing collisions at sea in effect at the time of the collision here in-

volved (33 U. S. C., 1946 Ed., §§92, 121), are as follows:*

"§92. Speed in fog, etc. (article 16).

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over. (Aug. 19, 1890, ch. 802, §1, 26 Stat. 326.)"

"§121. Additional precautions required generally (Article 29).

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (Aug. 19, 1890, ch. 802, §1, 26 Stat. 328.)"

STATEMENT OF THE CASE

Petitioners were all passengers on the British cross-channel ferry *Duke of York* which makes a regular overnight run between England and Holland. At the time of this collision, this vessel was proceeding from the Hook of Holland to Harwich just north of London, England.

After travelling through intermittent fog and drizzle during the night of May 6, 1953, the *Duke of York* was about

*Effective January 1, 1954 these regulations were replaced by Rules 16 and 29, 33 U. S. C. Secs. 145n, 147a. No material change was effected by this revision.

1½ miles from the Galloper Lightship off the coast of England when the lights of a vessel were seen on the port bow about one-quarter of a mile away.

At that time, the U.S.N.S. *Haiti Victory* was proceeding from Southampton to Bremerhaven on a regular run carrying troops and cargo. According to the testimony of her pilot and crew, she had proceeded up channel believing that the visibility was good. The radar was in operation but was turned on standby so that it could be placed in instant use by turning a switch. Just prior to the collision the radar was used to obtain a position off Galloper Lightship on the port hand but nothing else on the starboard hand was observed and the testimony shows that if the starboard side of the radar scope had been observed the *Duke of York* could have been seen and the collision avoided.

Shortly after this observation, a whistle was heard on the starboard bow. After peering forward from the starboard wing of the bridge and then going to the radar and observing a target, he went to the starboard wing of the bridge again and seeing nothing ordered the engines stopped. Shortly thereafter the *Duke of York* was sighted about a quarter of a mile away on the starboard bow but it was too late for any avoiding action and the vessels collided. The *Haiti Victory* penetrated the port side of the *Duke of York* nearly 35 feet with the result that the *Duke of York's* bow was severed and broke away. Petitioners include the representatives of five passengers on the *Duke of York* who were killed and as well as those who were injured. The remaining passengers are claiming for lost baggage and personal effects.

The United States of America, as owner of the U.S.N.S. *Haiti Victory*, filed a petition for limitation and/or exonera-

tion from liability under Sec. 183(b) of Title 46 U. S. C. in the District Court for the Eastern District of Virginia, Norfolk Division. Petitioners herein filed claims in accordance with said section. The British Ministry of Transport, as owner of the *Duke of York*, also filed its claim for damages. The petitioners herein thereupon filed petitions to serve cross-claims against the Ministry of Transport under Rule 56 of the Supreme Court Rules. The District Court denied these petitions but the Court of Appeals for the Fourth Circuit reversed this decision.

The District Court held that the *Haiti Victory* was without fault and this decision was affirmed by the Court of Appeals. It is to reverse this portion of the decision that this petition is submitted.

REASONS FOR ALLOWANCE OF THE WRIT

The Court of Appeals and District Court below found no fault on the part of the pilot for not using radar when he believed the visibility good even though this belief was incorrect. The vessel was exonerated from all liability even though the radar lookout was immediately available and could have prevented the collision if it had been used.

This conclusion was reached by the Courts below on the ground that the pilot did not know there was fog ahead and had no reason to believe there was fog ahead. This Court on the contrary has repeatedly held that a navigator makes a mistake of fact at his own peril if the means are available to correct his mistake.

I.

The decision of the Court below relaxes the high standards of care set by this Court to promote safety of life at sea.

Never before has a negligent mistake been justified if there were any reasonable means available to ascertain the truth. Even where a navigator makes an honest mistake, he should be condemned if he had the means to ascertain his mistake. Any other rule would weaken and cut away the long standing traditions of good seamanship required for the safety of all in the maritime industry. In the modern age of high speeds and larger and larger vessels, even stricter rules of good seamanship are required. Modern inventions designed to aid the navigator cannot be forgotten and brushed aside simply because the pilot mistakenly thinks they are not required.

As stated by Mr. Justice McLean in *Nelson* v. *Leland*, 63 U. S. 50, 55 (1860):

> "The Commander cannot lessen his responsibility by alleging his mistake. He is bound to make no mistake for it is his duty to stop his boat when he doubts, until he ascertains the facts."

Actually there was never any doubt in the master's mind that there was a light ahead. He simply stated he made a mistake and thought that a light which he saw was on the beach when it was on a barge which he struck and sank.

In *Pfister* v. *Greening*, 76 U. S. 510 (1870) a mistake on lights was also made by faulty visual observation. Mr. Justice Bradley, speaking for the Court at page 512, said:

> "Had the Mate been on the lookout, as an officer in command, with a light ahead, ought to have been, the difficulty would not have occurred."

In *The Oregon*, 158 U. S. 192 (1895), the pilot mistakenly thought that the anchor light of the *Clan Mackenzie* was a shore light at Coffin Rock. This Court speaking through

Mr. Justice Brown declared this mistake to be inexcusable because if adequate lookouts had been employed the mistake would never had been made. Simply by changing the word "light" to "visibility" the application of the principle is clear.

The three cases sighted above reveal the strict accountability to which this Court has held all navigators who have the safety of people and property in their hands. If additional lookouts were required, lookouts should be posted. Here the radar lookout could have been posted and the collision avoided. It is no excuse to say a mistake was made because the law of the sea does not permit mistakes where you could have corrected them.

In the case at bar the pilot was under the mistaken belief that the visibility was good in all directions. He stated that lights were visible on the English Coast along the port hand (T134). About 0400 a vessel was seen ahead which apparently came from Holland and which later passed down the port side (T136). The collision occurred at 0416 and at the time just prior to the collision the pilot testified at page 164 of the transcript:

"Q. Was anyone keeping a lookout on either wing of the bridge?

A. No, sir, not at that time. In the wing of the bridge? No.

Q. The only lookout you had was the one on the bow?

A. On the bow and I was a lookout and the second mate was a lookout.

Q. No one saw this ship.

A. No, sir.

Q. The only explanation you can give is the fact that it was in a fog bank?

A. Yes, sir.

Q. No one saw the fog bank?

A. No, sir. It was a smooth sea and a grey sky and there was no horizon anywhere although I had had ample evidence of clear visibility. I had looked at it. It was perfectly clear. *There was no horizon there.*" (Emphasis added)

On this state of the evidence the District Court and the Court of Appeals accepted the pilot's view that he did not know there was fog nor had he any reason to believe that there was fog in the vicinity.

It is petitioner's contention that such a mistake is inexcusable where a proper lookout by radar would, in a few seconds' time, have pierced the area where there was no horizon and determined certainly what the true facts were. In the words of Justice Brown in *The Oregon, supra,* "If adequate lookouts had been employed, the mistake would never have been made."

The importance of the use of radar in modern navigation has been stressed in numerous cases before the lower courts but has not been specifically before this Court. In the Second Circuit failure to make an adequate use of radar equipment was held to be in direct violation of Article 29 of the International Regulations for Preventing Collisions at Sea, *supra, United States* v. *The Australia Star*, 74 F. Supp. 145, *aff.* 172 F. 2d 472 (2nd Cir. 1949). Judge Rifkind in The District Court declared this principle at page 149:

"The fault of the Australia Star is that she chose to remain blind when she had the means to see.

Prudent navigation involves taking advantage of all the safety devices at hand. Insofar as it is the judicial

> function to fit scientific discoveries into the framework of laws not tailored to their measure, the function should be carried out with an eye to the general purposes of the law, and to desirable social ends." (Emphasis added)

A previous effort to fit new scientific discoveries into the framework of the law is illustrated by the Second Circuit in *The T. J. Hooper*, 60 F. 2d 737 (2nd Cir. 1932) when the question of marine radios was raised. The master of a coastwise tug was under the mistaken impression that the weather forecast was good and that it was safe to proceed from the Delaware Capes to New York. In fact, there was a storm forecast and if the tugs had listened to it they would have avoided the subsequent loss.

We do not contend that constant use of the radar is required as the evidence shows that excessive use will burn out one unit of the set having a relatively short life. However, on a vessel moving at 17 knots as the *Haiti Victory* was on a heavily traveled route where fog is a known hazard which occurs at unexpected times, vigilance of the highest order is required and periodic use of the radar at long range would have been prudent.

On the *Haiti Victory*, the pilot complacently looked ahead and thought the visibility was clear although he admits he saw no horizon. The range of visibility is just as important to the seaman as to the motorist on the road. Any mistake as to the extent of visibility can be fatal in either instance. As a result of the pilot's complacent reliance on his visual observation, the all-powerful aid to vision was forgotten. The Second Officer took his fix on Galloper Light vessel with the same nonchalance relying again on what he thought he saw. If we believe, as we must at this stage, that the Second Officer actually never saw the target on the starboard

side of the twelve-inch scope his negligence is still inexcusable.

II.

The Courts below have relaxed a fundamental navigational rule that a vessel must stop her engines immediately on hearing a fog whistle forward of her beam.

The second paragraph of Article 16 of the Regulations for Preventing Collisions at Sea provides as follows:

> "A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over. (26 Stat. 326)

On the contrary the pilot in this case wasted the time it took his vessel to proceed about 1700 feet or approximately one-third of a mile before stopping his engines. The burden was then on the offending vessel to show that this error not only did not but could not have caused the collision. Since the vessels were on crossing courses and finally sighted each other one-fourth of a mile apart, it is clear that if the engines had been stopped a minute before considerable speed could have been run off the vessel. The United States was not able to prove that the accident was unavoidable one minute before collision when the whistle was first heard.

The courts below have disregarded the clear and uncompromising rule of this Court and of the Courts of Appeal in the Second and Ninth Circuits. *Lie* v. *San Francisco & Portland SS Co.*, 243 U. S. 291; *Johnston-Warren Lines* v. *United States*, 196 F. 2d 689 (2nd Cir. 1952); *The Silver Palm*, 94 F. 2d 754 (9th Cir. 1938).

The Court of Appeals below does not give any specific reason for disregarding the rule but significantly cites *The Umbria*, 166 U. S. 404, which was decided in April 1897 some two months before Section 16 set forth above went into effect. At the time of *The Umbria*, the Court considered Article 18 of the Revised International Regulations of 1885 (23 Stat. at L. 438) to be applicable:

> "Art. 18: Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary."

It is, of course, clear that the present rule of Article 16 is much stricter than former Rule 18 discussed in *The Umbria*.

This Court in *Lie* v. *San Francisco SS Co.*, *supra*, after quoting Mr. Justice Brown in *The Umbria* states at page 297:

> "It is enough to say that this second paragraph is an addition to the former rule for preventing collisions at sea, which the International Conference recommended, after full discussion by the most intelligent seafaring men of many nations."

Further on, at page 298, on finding that the *Selja* had failed to stop on first hearing a whistle forward of the beam, Mr. Justice Clarke concluded:

> "Such a state of fact makes sharply applicable the conclusion of this court in The Pennsylvania, 19 Wall. 125, 22 L. ed. 148: 'But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In

such a case the burden rests upon the ship of showing, nor merely that her fault might not have been one of the causes or that it probably was not, but that it could not have been.' "

We do not contend that the facts in *Lie* v. *San Francisco SS Co., supra*, are identical to the case at bar because Lie as master proceeded at half speed and slow speed of three knots for nearly fifteen minutes after hearing a distant fog signal. On the other hand the pilot of the *Haiti Victory* was proceeding at 17 knots and continued at that speed for about one minute before stopping his engines. This was done in spite of the fact that he stated that he knew as soon as he heard the whistle that it had to be a fog signal (T152). He knew at that moment there was a fog bank ahead which he states he did not know about before. In spite of that he proceeded for about one-third of a mile before stopping his engines.

The Court of Appeals has relied on *The Umbria, supra*, which did not involve the strict modern statute as interpreted by this Court and many of the lower courts.

In *Johnston-Warren Lines* v. *United States*, 196 F. 2d 689 (2nd Cir. 1952), a delay of one minute was condemned and the vessel was only going six knots. In *The Silver Palm*, 94 F. 2d 754 (9th Cir. 1938), the delay was also one minute and the vessel was proceeding at 18 knots practically the same situation as the instant case.

The decision below is not consistent with the decisions of this Court or with the Court of Appeals for the Second and Ninth Circuits.

CONCLUSION

The decision below involves concepts as old as sailing itself, in the fog rules, as well as the new situations presented by radar. A firm stand is required to prevent any relaxing of fundamental rules of good seamanship. It is accordingly urged that a writ of certiorari to review the decree of the Court below should be granted.

Respectfully submitted,

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